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September 3, 2019

By Email

Honorable Anita B. Brody
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 7613
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In re: Nat'l Football League Players' Concussion Injury Litig., No. 12-md-2323-AB

Dear Judge Brody:

The NFL Parties respectfully submit this letter in response to Claimant A.G.'s August 22, 2019 Rule 60(b) motion (the "Motion") (Doc. No. 10817). As set forth below, this Court should summarily deny the Motion because it lacks jurisdiction over this matter given Claimant A.G.'s pending appeal in the Third Circuit of this Court's July 2 Order. Given this posture, the proper procedure under the governing rules—to the extent Claimant A.G. wants to persist with this futile exercise—is clear: Claimant A.G. must ask this Court for an indicative ruling that his 60(b) Motion has likely merit, in which case the Third Circuit may remand the matter. And, putting aside the procedural infirmities of this Motion, Claimant A.G. is wholly unable to raise any legitimate ground for this Court to

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Honorable Anita B. Brody

2

revisit its July 2 Order. Rather, this entire exercise is meritless and a waste of judicial and party resources.

As an initial (and dispositive) matter, this Court lacks jurisdiction over Claimant's Rule 60(b) Motion. As the Court is aware, its July 2 Order rejected Claimant's objection to the Special Master's finding that he is not entitled to a claim award, which objection wrongly argued that the "generally consistent" standard does not apply to pre-Effective Date claims. (July 2, 2019 Order, Doc. No. 10712.) Claimant then filed a Notice of Appeal on July 29, 2019, which the Third Circuit docketed on August 6, 2019, thereby divesting this Court of jurisdiction with respect to the claim. (See Notice of Appeal, Doc. No. 10772); *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) ("[T]he timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case"). That appeal remains pending in the Third Circuit.¹ Claimant has also filed a pending motion with the Third Circuit for limited remand to permit this Court to hear his Rule 60(b) Motion, thus conceding that this Court lacks jurisdiction over his Rule 60(b) Motion. See Fed. R. Civ. P. 62.1, Advisory Committee Notes ("After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand.").

Given that this Court lacks jurisdiction over this Motion, the Federal Rules of Civil Procedure are clear as to how Claimant must proceed. Specifically, pursuant to Federal Rule of Civil Procedure 62.1, Claimant must file a motion for an indicative ruling that this Court would grant the Rule 60(b) Motion if the Third Circuit remanded the case or that the Motion raises a substantial issue. See *Ray v. Pinnacle Health Hosps., Inc.*, 416 F. App'x 157, 160-161, (3d Cir. 2010); see also Fed. R. Civ. P. 62.1(a); Fed. R. App. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings. . . .") (emphasis added). To date, Claimant has made no such Rule 62.1 motion and his appeal has not been remanded. Thus, the Court should summarily deny his Rule 60(b) motion for lack of jurisdiction. See *In re Whoolery*, 754 F. App'x 120, 121 (3d Cir. 2018).

In any event, a request for an indicative ruling here would be futile because the putative Rule 60(b) Motion is meritless and would waste judicial and party resources. Although Claimant's Motion is styled as a motion made pursuant to Rule 60(b), Claimant actually now purports to dispute the Special Master's findings of fact—specifically, that his current diagnosis did not qualify under the "generally consistent" standard—which

¹ On August 6, 2019, the Clerk of Court for the Third Circuit issued an order requiring the parties to file briefs addressing the Third Circuit's authority to review this Court's July 2 Order. On August 20, 2019, the parties submitted responses: Claimant argued that the Third Circuit possesses jurisdiction over his appeal, while both the NFL Parties and Class Counsel argued that Appellant's appeal did not present an important question warranting review under the collateral order doctrine—the only route to appellate review available to Claimant.

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3

became final and non-appealable as of the Special Master’s October 11, 2018 opinion. (See Order Appointing Special Maters at 5 (“[t]he parties agree that the decision of the Master(s) findings will be final and binding”), Doc. No. 6871); *see also* Fed. R. Civ. P. 53(f)(3)(B) (authorizing parties to stipulate, with court approval, that the findings of a special master will be final); (SPID 260006736, Doc. No. 187641 (October 10, 2018, Special Master Decision)). Indeed, Claimant recognized that these findings of fact were binding and not reviewable by this Court when he decided not to contest them in his underlying objection to the Special Master’s determination filed with this Court. Instead, Claimant’s objection was that the Special Master committed legal error by applying the “generally consistent” standard to his pre-Effective Date claim—a legal argument that he appears to have entirely abandoned, admitting that this Court’s July 2 Order is correct. (See Rule 60(b) Motion at 8 (“Diagnoses made by board-certified neurologists Pre-Effective Date, need only be ‘generally consistent’ with the diagnostic criteria set forth under the Settlement Agreement.”).)²

Left with no viable legal appeal and an unassailable final ruling on the facts, Claimant resorts to asserting a “mistake” under Rule 60(b)(1). *See* Fed. R. Civ. P. 60(b)(1). To that end, Claimant claims that this Court’s July 2 Order acknowledged that “there is some unknown action that took place by the NFL, the Claims Administrator or the AAP, that led to the district court being provided incorrect information.” (See Rule 60(b) Motion, at 13 (citing the Court’s July 2 Order, where the Court stated that it “is troubled by the events leading to this objection”)). Notwithstanding Claimant’s contrived reading, the Court’s July 2 Order has not identified a Rule 60(b)(1) mistake that warrants reversal. *See, e.g., Flynn v. Best Buy Auto Sales*, 218 F.R.D. 94, 97 n.3 (E.D. Pa. 2003) (explaining that “Rule 60(a) deals with clerical mistakes of the court, jury, clerk or parties”). Rather, it is clearly referring to the events described in the preceding paragraph—namely, that Claimant was not told at an earlier time that his claim was wrongly approved. Alternatively, Claimant relies on Rule 60(b)(2), “newly discovered evidence,” and Rule 60(b)(6), “any other reason that justifies relief.” Claimant’s Motion, however, identifies neither new evidence nor any other reason that would justify relief from this Court’s order.

Finally, Claimant overstates the purported “manifest injustice” and “extreme” hardship imposed on him by the valid and proper claim denial. (See Rule 60(b) Motion, at 12.) Contrary to his protestations that delay in receiving a diagnosis could “potentially reduce his award drastically as the awards are reduced based on age of the claimant” (*id.*), Claimant is just 37 years old. The maximum Monetary Award for a Level

² While Claimant does not purport to base his Rule 60(b) Motion on legal error, and indeed now appears to concede the legal ruling he once assailed, the Third Circuit is clear that Rule 60(b) is not available for legal error. *Jaye v. Oak Knoll Vill. Condo. Owners Ass’n, Inc.*, 2019 WL 3492464, at *1 (3d Cir. Aug. 1, 2019) (stating that “legal error, without more does not warrant relief under [Rule 60(b)]”) (quoting *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003)); *see also* Moore’s Federal Practice – Civil § 60.41 n.59 (explaining that the “Third Circuit does not permit request for reconsideration of decision on legal issues to be transformed into claim that there is ‘mistake’ under Rule 60(b)(1).”).

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Honorable Anita B. Brody

4

1.5 Qualifying Diagnosis on the Monetary Award Grid is available to a Retired NFL Football Player under age 45. (See Settlement Agreement, Ex. 3.) In other words, Claimant has nearly *eight years* to receive a Qualifying Diagnosis that would provide him with the equivalent compensation that he purports to have been wrongfully denied by the Special Master. Moreover, Claimant is eligible to participate in the free Baseline Assessment Program (“BAP”) where a Level 1.5 Qualifying Diagnosis is available if he meets the Settlement’s diagnostic criteria. Simply put, Claimant’s continued fight—now tallying two objections filed with this Court, a frivolous appeal filed in the Third Circuit, and a meritless Rule 60(b) Motion—are a waste of party and judicial resources when Claimant has known since October 2018 that he could simply make a BAP appointment.

For the reasons set forth above, the NFL Parties respectfully submit that this Court lacks jurisdiction to hear the Rule 60(b) Motion and it should summarily deny the Motion pursuant to Rule 62.1(a). Should the Court find it necessary to receive briefing on Claimant’s Rule 60(b) Motion, the NFL Parties reserve all rights to respond to that Motion in full upon the direction of this Court and a reasonable briefing schedule.

Respectfully submitted,



Bruce Birenboim

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